COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-178881

August 16, 1973

Tele Sec
1725 K Street, NW.
Washington, D. C. 20006

Attention: Mrs. Helga Tarver
Vice President

Gentlemen:

This is in reply to your letter of July 16, 1973, and prior correspondence, protesting against the award of a contract under invitation for bids (IFB) INV-CO-10-73, issued by the Immigration and Naturalization Service (Immigration), Department of Justice.

The subject IFB, a 100% small business set-aside, solicited bids for the counting, sorting, alphabetizing, and tabulating of approximately 5,000,000 alien address cards.

Your protest is based on alleged deficiencies in the IFB regarding acceptance standards, method of counting, lack of a requirement for a site inspection, failure to include a wage determination under the Service Contract Act and the use of the small business set-aside provision.

The first basis of your protest is that there are no acceptance standards described in the IFB. Paragraph 7 of the description of services reads as follows:

> Accuracy. It is essential that an accurate count be maintained of the Forms I-53 received. The total of all the aliens included in the reports (attachment I) should equal the total count of the Address Cards received by the contractor.

You believe that the standard should have been stated as 100% accuracy, or whatever degree of accuracy the agency desired, so that all bidders would have bid from a common base. Our Office believes that "accurate" is a sufficiently precise term to allow bidders to bid intelligently. Accurate has been defined as free from error or defect. Hoye v. Schaefer, 148 N.E. 2d 532, 534. Therefore, from our reading of

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the specifications, it appears that 100% accuracy is desired and expected by Immigration.

Secondly, you contend that no system of checking the number of cards processed was described in the IFB, and therefore a bidder would not know how or if his count would be checked. The IFB did, however, show that payment would be made on the piece rate basis, and, therefore, it appears that a bidder would be aware that his count would be verified by the agency.

Thirdly, you state that there was no provision that a site inspection would be performed at the contractor's facility. While there was no such provision in the solicitation, the Federal Procurement Regulations (FPR) give the contracting officer the authority to make such an inspection to assure himself of the prospective contractor's responsibility. FPR Section 1-1.1205-4 states, in part, as follows:

§ 1-1.1205-4 Preaward surveys.

(a) A preaward survey is an evaluation of a prospective contractor's performance capability under the terms of a proposed contract. Such evaluation shall be used by the contracting officer as an aid in determining the prospective contractor's responsibility. The evaluation may be accomplished by use of (1) data on hand, (2) data from another Government agency or commercial source, (3) an onsite inspection of plant and facilities to be used for performance of the proposed contract, or (4) any combination of the above. Preaward surveys shall be conducted in accordance with agency procedures.

(b) A preaward onsite survey shall be made when the information available to a purchasing office (see §1-1.1205-3) is not sufficient to enable the contracting officer to make a determination regarding the responsibility of a prospective contractor. * * *

Therefore, based on the aforementioned regulation, the contracting officer has authority to obtain a site inspection notwithstanding the absence of such a clause in the solicitation.

The fourth basis of your protest is that a wage determination under the Service Contract Act of 1965 (41 U.S.C. 351-357) should have been included as part of the solicitation because of your estimate that 160 clerks would be required for an 8 to 10 week period to perform the

contract. In the report to our Office from Immigration, dated June 27, 1973, a copy of which was furnished to you, the agency stated that it had been advised by the Department of Labor that no wage determination had been made which applied to the specified locality and class of employees involved in the contract. Section 4.6(d) of Title 29 of the Code of Federal Regulations provides guidance as follows when no determination has been made:

> (d) In the absence of a minimum wage attachment for this contract, neither the contractor nor any subcontractor under this contract shall pay any of his employees performing work under the contract (regardless of whether they are service employees) less than the minimum wage specified by section 6(a)(1) of the Fair Labor Standards Act of 1938 ($1.60 per hour). However, in cases where section 6(a)(2) of the Fair Labor Standards Act of 1938 is applicable, the rates specified therein will apply. Nothing in this provision shall relieve the contractor or any subcontractor of any other obligation under law or contract for the payment of a higher wage to any employee.

Therefore, in the course of performance of the contract, the contractor would be obligated to pay the current minimum wage to his employees, and the absence of a wage determination in the IFB and in the resultant contract will not affect the validity of the contract. 51 Comp. Gen. 72 (1971).

Next, you contend that the solicitation contained no statement as to the standards to be used to determine what was a small business concern for purposes of the set-aside. The portion of the solicitation which dealt with the small business set-aside contained the following definition:

> b. Definition. A "small business concern" is a concern, including its affiliates which is independently owned and operated, is not dominant in the field of operation in which it is bidding on Government contracts, and can further qualify under the criteria set forth in regulations of the Small Business Administration (13 CFR 121.3-8). * * *

Section 121.3-8 of Title 13 of the Code of Federal Regulations contains various standards as to what constitutes a small business in various industries. In paragraph (e) dealing with contracts for services, the following statement is contained:

> (e) Services. Any concern bidding on a contract for services, not elsewhere defined in this section, is classified as small if its average annual receipts for the preceding three (3) fiscal years do not exceed $1 million.

Our Office believes the above definition is sufficient to advise a bidder as to whether his firm would be a small business for purposes of the set-aside.

The final basis of your protest is that the contract does not provide for payment until the work is complete and you estimate that the payroll alone on the work will exceed $100,000 and will place a prohibitive burden on a small business concern. However, the contract is of relatively short duration, two months, and bid prices were received for considerably less than what you estimated the payroll alone would be. The question of whether any prospective contractor will be capable of performing the contract financially and otherwise is, of course, a matter of responsibility that will have to be resolved by the contracting agency within existing procedures before an award is made.

For the foregoing reasons, your protest is denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States